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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000808-ME

L.J.D., JR. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 14-AD-00248

COMMONWEALTH OF KENTUCKY;
CABINET FOR HEALTH AND FAMILY
SERVICES; A.N.B.; A.J.D., a child — APPELLEES

AND

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ACTION NO. 14-AD-00249

COMMONWEALTH OF KENTUCKY;
CABINET FOR HEALTH AND FAMILY
SERVICES; A.N.B.; A.D.B., a child APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

ACREE, JUDGE: This appeal is brought to challenge the Fayette Circuit Court's findings of fact, conclusions of law, and order of judgment terminating L.J.D., Jr.'s (Father) parental rights to his two children. After careful review, we reverse and remand for additional proceedings.[1]

The Cabinet for Health and Family Services filed a dependency, neglect, and abuse petition on September 5, 2013, after child, A.D.B., tested positive for methadone and Percocet upon delivery. The petition alleged that Mother also tested positive for substances for which she was unable to provide prescriptions. A.D.B. remained in the neonatal intensive care unit for three weeks to go through withdrawal. During this time, Mother refused to cooperate with the

[1] Pursuant to Kentucky Rules of Civil Procedure (CR) 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

Cabinet and stopped visiting the hospital. The petition further alleged that A.D.B.'s three-year old sibling, A.J.D., to be at risk of harm if left in Mother's custody. L.J.D., Jr. was listed as the alleged Father on the petition, but no address or telephone number was provided. The children were placed in the temporary custody of the Cabinet.

Mother stipulated to risk of neglect of A.D.B. based upon her drug use and an adjudication order was entered to that effect on September 23, 2013. A dispositional report was subsequently submitted to the court which suggested the children should remain committed to the Cabinet. The report contained Father's name and date of birth, but also noted that paternity had not been established and expressed an intent to conduct an absent parent search. A disposition order was entered consistent with the Cabinet's recommendation.

Father had his first contact with a Cabinet worker in February 2014. Also, on February 24, 2014, a warning order attorney was appointed for Father. The warning order attorney sent a certified letter to an address for Father. A certified receipt card was signed on April 16, 2014.

The matter was set for review on June 23, 2014. Prior to the hearing, the Cabinet submitted a report and recommended the children's goals change from "return to parent" to "adoption." The report states that a paternity test had established Father as the biological parent of the children. It also refers to the non-involvement and absenteeism of the parents and continued lack of progress on case

plans. The court accepted the Cabinet's recommended goal change in a permanency order. In that same order, counsel was appointed to represent Father.

The Cabinet filed a petition for the termination of parental rights of Mother and Father just three months later on September 18, 2014. Regarding Father, the petition provided:

> The respondent father has adopted a pattern of conduct of criminal behavior, resulting in current incarceration, and which had rendered him incapable of caring for the immediate and ongoing needs of the child for extended periods of time. . . . The respondent father has abandoned the child for a period of not less than ninety days.

(R. at 5).

The termination trial was scheduled for March 30, 2015. Prior to trial, Father was appointed new counsel; he also moved to continue the proceeding. The motion stated that Father was going to be released from the Breckenridge County Detention Center on June 4, 2015. Father advised that he intended to return to Fayette County where he has extensive family support, and seek employment. Father asked for the opportunity to be able to work a case plan.

The court considered and denied Father's motion at the start of the proceeding on March 30, 2015. Father participated in the termination trial telephonically from the Breckenridge County Detention Center.

Father testified that he was currently incarcerated for receiving stolen property. He was held on the charge from February 16, 2014 to April 18, 2014. He was then released on bond and returned to Fayette County Detention Center to

serve his sentence on June 29, 2014. Father was paroled in November 2014, and thereafter, he entered the Substance Abuse Program (SAP) at Breckenridge on December 14, 2014. In addition to dealing with substance abuse, Father testified that he participated in services through the SAP program including counseling, working a twelve-step program, life skills training, classes on employment skills and learning financial responsibility. He testified that after his release in June, he intended to return to Fayette County, live with his family, and find employment. He stated he has welding and construction maintenance certifications.

Father admitted that he has four felonies and is designated as a persistent felony offender. He testified that he had served a total of six years' incarceration for his offenses. Prior to his most recent crime, Father's last jail sentence ended in 2010.

Father testified that he obtained a pass and was able to attend the birth of A.J.D., his first child with Mother, in January 2010. Father stated that he was incarcerated for the first six months of A.J.D.'s life, but Mother brought the child to visit him. Father testified that they all lived together after he was released, and he had a close relationship with A.J.D. He stated that when Mother became pregnant with their second child, their relationship ended, and Mother limited his contact with A.J.D. Father testified that Mother would not allow Father to be present for A.D.B.'s birth. Mother did allow him to visit A.D.B. at the hospital, however, and it was then that Father learned the child was born with drugs in her system. Father has not seen the children since August 2013.

Father testified he did have child support obligations he met in the past, but because he has been incarcerated, he was in arrears. He was not sure of the amount.

Father testified he had contact with a Cabinet worker in February 2014. However, he testified he was never made aware of any court dates in the dependency action while he was out on bond from April 2014 until the end of June 2014. He also acknowledged that he did not contact the Cabinet during this time.

Father's next contact with the Cabinet occurred in August 2014. Cabinet worker, Traci Coleman, met with Father at the Fayette County Detention Center to discuss the case, how the children were doing, Father's intentions, and the outlook of his sentence. Father and Ms. Coleman met again briefly in September 2014 and October 2014. She additionally provided Father with forms related to the potential for termination and subsequent adoption. Father advised Ms. Coleman that he thought Mother was working a case plan while he was incarcerated. Father testified that he was never offered a case plan.

Ms. Coleman also testified at the termination trial. She stated that she was assigned to the case in May 2014. She testified that the case plan for both parents included a substance abuse assessment and treatment, stable housing and employment, maintaining contact with the Cabinet, appearing in court, following all court orders, and a domestic violence assessment for Father. Ms. Coleman testified that she was not sure about what occurred prior to her involvement, but since she had been assigned the case, she asserted that Father had a case plan.

However, she also testified that with the uncertainty of his release, she could not promise him that he would have the opportunity to work a case plan. Ms. Coleman testified that she did not have much of an understanding of Father's sentence. She was of the opinion that Father had adopted a criminal lifestyle. She further stated that she has no knowledge of Father's participation in the SAP program because he had not sent her anything about it. Ms. Coleman also testified that any parent is entitled and the Cabinet is obligated to provide them with a case plan up until their parental rights have been terminated.

After closing arguments, the Fayette Circuit Court found that the Cabinet had presented clear and convincing evidence satisfying the statutory requirements of KRS 625.090. Findings of fact, conclusions of law, and order of judgment terminating Mother's and Father's parental rights were entered on May 1, 2015. Father now appeals.

This Court will only disturb a family court's decision to terminate a person's parental rights if clear error occurred. If there is substantial, clear, and convincing evidence to support it, the decision stands. KRS 625.090(1); *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010).

Father makes three arguments on appeal: first, he maintains that the family court erred in denying his motion for a continuance of the termination trial; next, he claims there were procedural deficiencies in the underlying dependency action; and lastly, he argues that the family court's findings of fact are insufficient to support the legal requirements for termination based on clear and convincing

evidence. We find merit in Father's last argument. Consequently, we begin our analysis there as resolution of the issue raised is dispositive of the other arguments.

We must agree with Father that the family court's findings of fact are insufficient; setting forth in the order the language from KRS 625.090 is not enough. *M.L.C. v. Cabinet for Health and Family Servs.*, 411 S.W.3d 761, 765 (Ky. App. 2013). Explanation and citation to specific facts supporting the court's decision as to each subsection of the statute is absent here. Seeking clarification or support from elsewhere in the record, we reviewed the March 30, 2015 hearing but could not justify affirming based on that review. Rather, the record appears to support the view that Father's incarceration provided the only grounds for termination of his parental rights. This, as we have previously held, is error. *Id.* at 766-67.

Termination of parental rights requires the satisfaction of three statutory provisions: (1) that the child is abused or neglected as defined by KRS 600.020(1); (2) that termination is in the best interests of the child; and (3) that one of the factors listed in KRS 625.090(2) is present, including that the child has been abandoned for not less than ninety days or that a parent has "continuously or repeatedly failed or refused to provide" for the child. *See* KRS 625.090(2). Incarceration of a parent is just one factor to be considered when reviewing a parent's conduct within the KRS 625.090(2) standard. *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995).

In this case, the family court found grounds for terminating Father's parental rights under three subsection of KRS 625.090(2): under subsection (2)(a), Father had abandoned children; under subsection (2)(e), he continuously failed to provide essential care and protection for the children for more than six months; and under subsection (2)(g), for reasons other than poverty, Father continuously failed to provide essential food, clothing, shelter, medical care, or education necessary for the children's well-being.

In order to terminate parental rights, at least one of these findings must be supported by clear and convincing proof. "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

We will consider the record with regard to these three individual findings under KRS 625.090(2)(a), (e), and (g), in sequence.

The Cabinet asserted at the termination trial that it was prepared to demonstrate that Father had adopted a criminal "lifestyle incompatible with parenting." *J.H. v. Cabinet for Health and Family Servs.*, 704 S.W.2d 661, 664 (Ky. App. 1985). Father was presumed to have abandoned his children because of the adoption of this lifestyle. However, the information regarding Father's criminal history was that he had four felonies in all and served a total of six years for his offenses. Notwithstanding his incarceration at the time of the hearing, his

prior convictions occurred before the birth of his first child, A.J.D., in 2010. There are no other details on the charges. Also, Mother had taken out two domestic violence orders on Father, the circumstances of which are unclear. Ms. Coleman, the cabinet worker, testified that she could not say that Father had abandoned the children because she was not sure the circumstances met the legal standard. Additionally, Father testified that prior to the birth of A.D.B., he was an involved father to A.J.D. and that his contact with the children was later limited by Mother.

"Abandonment is a matter of intent which may be proved by external facts and circumstances[.]" *Id.* at 663. And, "whether abandonment occurs through incarceration sufficiently to support terminating parental rights must be strictly scrutinized." *Id.*

Overall, the evidence presented on the record, at most, established that Father had a criminal history. Because the family court did not provide any specific factual findings for its conclusion that Father abandoned children, it appears to have relied primarily on Father's incarceration as grounds. This was error as "incarceration alone can never be construed as abandonment as a matter of law." *Id.* Without more, this does not amount to clear and convincing evidence required to support the family court's conclusion that Father had abandoned his children.

In sum, this evidence of incarceration, lacking specificity regarding the nature of the crimes, does not alone establish that Father adopted a lifestyle of

crime and is insufficient evidence to support a finding that satisfies KRS 625.090(2)(a).

Similarly, the Cabinet contended at the termination trial that Father failed, under KRS 625.090(2)(e), to provide the children for at least six months with essential parental care and protection and, under KRS 625.090(2)(g), failed for reasons other than poverty alone, to provide food, clothing, shelter, medical care, or education to his children, and that there is no reasonable expectation of improvement. This contention, like the others, was based on proof that Father engaged in a pattern of criminal conduct resulting in his felony convictions and incarceration. There was also very brief, undeveloped testimony about Father's child support obligations. In its order, the family court did not explain or cite specific facts as they relate to, or how they satisfy, these statutory requirements for termination. Again, it is unclear from the record whether the findings under KRS 625.090(2)(e) and (2)(g) are based on anything other than Father's incarceration and criminal history.

Furthermore, the evidence presented on the record does not support the court's finding that the Cabinet "offered or provided all reasonable services to the family, but the parents have failed or refused or have been unable to make any changes to their circumstances, conduct or conditions which would allow the child to be safely returned to either or both respondent parent's care." (R. at 47). Such a finding is significant as it pertains to the best interests of the children as well as

providing a ground for termination. KRS 625.090(3). Again, however, the family court did not identify any of the reunification efforts or services.

It is unclear from the record whether the Cabinet ever established a case plan for Father. Ms. Coleman testified about a case plan for the parents, but the record before us does not reflect Father's knowledge of or agreement to a case plan. Ms. Coleman further testified that any parent desiring a case plan is entitled to one, and the Cabinet is obligated to provide one up until parental rights have been terminated. From what we can tell from this record, the Cabinet did not follow this policy.

Ms. Coleman met with Father three times while he was incarcerated at the Fayette County Detention Center: once each in August, September, and October 2014. She testified that they spoke about the case and the children. She provided him with paperwork to fill out should the children be adopted. The only discussion about a case plan was that with the uncertainty of his release, Ms. Coleman could not promise Father that he would have time to work a case plan, which suggests he had not been provided one. There was no evidence that Ms. Coleman ever visited Father at the Breckenridge County Detention Center where he was participating in SAP. Ms. Coleman stated she knew nothing about SAP.

Father testified he was never presented with a case plan despite expressing his interest in completing one. He acknowledged that he did not contact the Cabinet while he was released on bond from April to June in 2014.

However, the Cabinet did not present any evidence of attempts to contact Father during that time frame as well.

Additionally, Father testified to the programs he had been participating in at Breckenridge. Notably, such a program seems to present tasks and conditions similar to that which would be provided by a case plan. Ms. Coleman testified that Father had not sent her any information on these programs. But the record shows that she also never attempted to contact Father while he was at Breckenridge in SAP. Their last contact was in October 2014.

Based on the foregoing, the record does not support the family court's finding that the Cabinet offered or provided all reasonable services for reunification of Father with children.

The Cabinet failed to present substantial, material evidence to support the statutory requirements for termination of Father's parental rights. Its reliance on Father's incarcerations, without more, cannot constitute substantial evidence supporting termination of his parental rights. We are mindful of the children's interests and need for stability in their lives. However, we cannot affirm the family court's order containing unsupported findings. "Without clear and convincing evidence in support of its findings, the trial court's ruling amounts to an abuse of discretion." *M.L.C.*, 411 S.W.3d at 765.

For these reasons, we reverse the trial court's order and remand for additional proceedings for further determinations regarding the bases for termination under KRS 625.090(2) and to determine "whether the cabinet has,

prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with" Father and, if not, whether "one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated[.]" KRS 625.090(3)(c).

ALL CONCUR

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